

177865

WILLOUGHBY & HOEFER, P.A.

ATTORNEYS & COUNSELORS AT LAW
1022 CALHOUN STREET (SUITE 302)
P.O. BOX 8416
COLUMBIA, SOUTH CAROLINA 29202-8416

MITCHELL M. WILLOUGHBY
JOHN M.S. HOEFER
ELIZABETH ZECK*
PAIGE J. GOSSETT
RANDOLPH R. LOWELL
K. CHAD BURGESS
NOAH M. HICKS II**
M. McMULLEN TAYLOR

AREA CODE 803
TELEPHONE 252-3300
TELECOPIER 256-8062

*ALSO ADMITTED IN TX
**ALSO ADMITTED IN VA

February 9, 2006

VIA HAND DELIVERY & ELECTRONIC MAIL

The Honorable Charles Terreni
Chief Clerk/Administrator
Public Service Commission of South Carolina
101 Executive Center Drive
Columbia, SC 29210

RECEIVED
2006 FEB -9 PM 4: 21
SC PUBLIC SERVICE
COMMISSION

RE: Proposed revisions to Article 8 of the Public Service Commission regulations;
Docket No. 2005-354-A

Dear Mr. Terreni:

On behalf of South Carolina Electric & Gas Company ("SCE&G"), let me express appreciation for the opportunity to offer comments on the proposed revisions to the Practice and Procedure article of the Commission's regulations ("Proposed Revisions"). SCE&G applauds the Commission's proactive approach to addressing issues and concerns of the entities and practitioners who often appear before the Commission through revisions and updates to the regulations.

By letter dated January 31, 2006, and as further presented at the public hearing on February 2, 2006, BellSouth Telecommunications, Inc. ("BellSouth") offered five specific comments on the Proposed Revisions. SCE&G concurs with those comments and urges the Commission to adopt the changes suggested by BellSouth. SCE&G would further request that the section related to the copies of prefiled testimony be amended to conform to the proposed language suggested for the Copies of Pleadings section (103-832, Prop. Rev. 103-821).

Another item that has been raised in other comments and was discussed at the public hearing is the issue of protestants. SCE&G certainly acknowledges that the public should have an opportunity to participate in any proceeding before the Commission. And both the current regulations and the Proposed Revisions allow for such participation. However, several small alterations to the definition of certain terms should address the concerns of the regulated utilities,

ensure public participation, and protect the integrity of the formal record upon which the Commission bases its decision in a proceeding.

There are several avenues currently available for such participation. First, a member of the public can always intervene in a case and participate fully as a party of record. Second, a member of the public can file a complaint under any of several statutory provisions if he or she believes they have been harmed by an act or omission of a jurisdictional utility. Third, a member of the public can “protest” and advise the Commission and the parties he or she generally objects to the relief being sought. See 26 S.C. Code Ann. Regs. 103-838 (Prop. Rev. 103-827).

Regarding the third category, there is a conflict within both the current regulations and the Proposed Revisions that creates confusion and should be addressed. Under the regulatory section specifically addressing protests (103-838, Prop. Rev. 103-827), a protest “will be placed in a public file associated with, but not part of the formal record, and will be available for such further explanation of the substantive matters raised therein” by the Office of Regulatory Staff. Such protests include written letters and could include a transcription of testimony provided at a hearing. This comports with the rules of evidence which govern proceedings before the Commission. 26 S.C. Code Ann. Regs. 103-870 (Prop. Rev. 103-846); see S.C. Code Ann. § 1-23-330. Only a party may offer evidence into the formal record, and a protestant is not a party. See 26 S.C. Code Ann. 103-804 (Prop. Rev. 103-804) (excluding protestant from the definition of party), 103-838 (Prop. Rev. 103-827) (stating that the “filing of a protest does not make a protestant a party of record”). If a protestant seeks party status, he or she must intervene.

A danger arises when a protestant at a hearing, either on the day of the merits hearing or at a public comment hearing prior to the merits hearing, provides statements and testimony that may or may not be germane to a proceeding and is not otherwise admissible into the formal record. Even if subject to cross-examination, without discovery such an examination is generally ineffective. Such protests or public statements should only be placed in the public file and should not be considered or relied upon in rendering a decision unless and until such a statement is properly accepted into the formal record pursuant to applicable evidentiary rules. Letters from individuals who are not parties to the proceeding should likewise be placed in the public file rather than the formal record.

This procedure is necessary to protect the integrity of the formal record. The inclusion of statements and materials in the formal record from individuals who are not parties and which are not properly introduced by a party of record raises fundamental questions of due process and equal protection. See S.C. Const. art. I, § 22; see Cameron & Barkley Co. v. South Carolina Procurement Review Panel, 317 S.C. 437, 454 S.E.2d 892 (1995) (administrative agency’s consideration of an issue without notice resulting in prejudice violates procedural due process). The inclusion of letters, for example, in the formal record for consideration without a full and fair opportunity for the parties to participate, respond, and cross-examine the individual offends not only due process but also raises questions of *ex parte* communications. See S.C. Code Ann. §§ 58-3-260, 1-23-360.

Confusion may also arise from the current definition of "pleading." Pleadings are included within the definition of "Formal Record." However, a "protest" is included within the definition of pleading, which would place the protest documents or statements into the formal record, despite the specific prohibition of on the inclusion of protestant's statements and documents in the formal record. Therefore, the Commission should delete the word "protest" from the definition of "Pleading," which would make clear that the oral and written statements of protestants may only placed in the public file, in conformance with the section regarding protests. See 26 S.C. Code Ann. Regs. 103-838 (Prop. Rev. 103-827). A pleading is not evidence, so it cannot be part of the formal record considered for purposes of deciding the case.

Again, SCE&G sincerely appreciate the Commission's time and consideration in reviewing the regulations and actively seeking the input of those who regularly practice and appear before the Commission. If you have any questions or would like to discuss any of these issues further, please do not hesitate to contact me.

Very truly yours,

WILLOUGHBY & HOEFER, P.A.



Randolph R. Lowell

RRL/msp

cc: Jocelyn G. Boyd, Esquire
David Butler, Esquire
Catherine D. Taylor, Esquire
Florence P. Belser, Esquire
Len S. Anthony, Esquire
Scott Elliott, Esquire
Margaret M. Fox, Esquire
Lara S. Nichols, Esquire
Patrick W. Turner, Esquire
Richard L. Whitt, Esquire
Frank R. Ellerbe, III, Esquire
(All via U.S. Mail)